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CONSIDERATION OF A DRAFT CONTAINED IN THE ANNEX TO RESOLUTION 1994/45 OF 26 AUGUST 1994 OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, ENTITLED DRAFT "UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES"

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SELF-DETERMINATION - THE AUSTRALIAN POSITION

Introduction

Recent years have witnessed an evolution of the right of self-determination. In the post Second World War context, it was principally thought of as a way in which the decolonisation process could be legitimised and facilitated. The right is now beginning to be discussed in terms of the development of democratic structures and minority and indigenous rights within existing states.

The International Legal Framework

2. The concept of self-determination first assumed international political significance following the First World War, with US President Woodrow Wilson's enunciation of his *Fourteen Points*. The principle was invoked in Europe as a justification for the dissolution of the Austro-Hungarian, Turkish and (partly) Russian Empires. Subsequently, and especially in the period following the Second World War, the principle was converted into a legal right on which were based colonial territories' claims for independence. However, the expression of the right to self-determination in international legal instruments has not been limited to this context: rather, self-determination is a right of all peoples.

3. Article 1 of the Charter of the United Nations includes among the purposes of the UN, "[the development of] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". In the early 1950s the General Assembly acknowledged that self-determination was a right of all peoples and nations, a right which was eventually set out in common Article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

4. Alongside this seemingly categorical imperative was another imperative of international law: the principle of territorial integrity. The principle is implicit in the Charter[1] and is generally regarded as a fundamental norm of international law[2]. States have repeatedly denied that the right of self-determination is a right of secession.

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1 See Article 2(4)

2 Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Existing Rights*, University of Pennsylvania Press, 1990, page 49

5. The international community has sought to reconcile the two principles of self-determination and territorial integrity in the General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) and the *Declaration on Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* ("the Friendly Relations Declaration" of 1970), and, more recently, the Declaration of the International Human Rights Conference in Vienna (1993). The Friendly Relations Declaration stated that the right of self-determination:

> "shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of sovereign or independent states conducting themselves in accordance with the principle of self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[3]

This was reaffirmed in the Declaration adopted on 24 October 1995 by the United Nations on the occasion of its 50th anniversary.

6. As stated by the Friendly Relations Declaration (supra), the right of self-determination of peoples in non-self-governing territories could be implemented by way of:

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by [the] people ...".

Once that choice is made ("external" self-determination), the right of self-determination which remains can only be exercised in ways which are consistent with that part of the Friendly Relations Declaration cited in paragraph 5 - that is, with the territorial integrity of the state, so long as the government of that state is representative. The break up of a state can still occur, but this should be considered as dependent on domestic political circumstance rather than on references to the right of self-determination in international law[4].

7. Some states have argued that the right of self-determination is a limited right which is extinguished on the attainment of independence by an ex-colonial territory - in other words, the right only applies to people in colonial territories. However, this qualification is not found in the Covenants, the General Assembly Declarations referred to above, the Vienna Declaration or any other instrument of the United Nations. On the contrary, the statements of the right consistently refer to it as a right belonging to "all peoples". The right must therefore be more general and continuing. Following on from this, the question to be addressed is the content of the right of self-determination. It is clear that, in accordance with the foregoing analysis, it does not give rise to a right of secession from an independent state with a representative government. While the international community accepts this principle, its practical application is not without difficulty. States have been reluctant to pass judgement on the representativeness of government. Nevertheless, the assessment as to whether a particular government is representative of its people must be capable of some objective assessment, and it would be difficult to say that a government elected by free and universal suffrage could be

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[3] The recent Vienna Declaration's statement on self-determination contained a similar caveat.

[4] As in the cases of the dissolution of the former Soviet Union and Czechoslovakia and the secession of Eritrea from Ethiopia.

described as unrepresentative of its people or peoples[5]. State practice since the Second World War in fact demonstrates that a right to secession will only arise where a government is guilty of gross and systematic abuses of the human rights of a group which could be categorised as a people.

Australia's position

8. In Australia's view, self-determination is not a static concept, but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs (relevant both to indigenous peoples and to national minorities). This proposition finds support in the words of the Article 1 of the Covenants (infra), together with Article 21 of the Universal Declaration on Human Rights[6] and Article 25 of the International Covenant on Civil and Political Rights[7]. Australia has also repeatedly stressed the point made above that the right of self-determination does not, except in the most exceptional circumstances, equate to a right of secession.

9. We have also argued strongly that self-determination, although a central human right, cannot be used to justify abuse of other rights, foremost among which is the right to life. The application of the principle of self-determination to distinct peoples living within independent states cannot be used to absolve those peoples or national governments from their responsibilities to protect the rights set out in existing international human rights law, both civil and political and economic, social and cultural.

10. The Australian Government is not a lone voice on this issue. This position is accepted by a number of, although not yet a majority of, governments[8] and by writers in international law[9]. In an explanatory note concerning the draft declaration on the rights of indigenous

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5 Obvious instances of this would be claims by the Quebecois in Canada or the Scots or Welsh in the United Kingdom that their governments were unrepresentative and that therefore they have a right to secession.

6 "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the equal right of access to public service in his country.
3. The will of the people shall be the basis of the authority of government: this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures."

7 This Article is in similar terms to the above.

8 See for example a statement by Belgian Foreign Minister Willy Claes to a conference on "The Right to Self-Determination of Indigenous Peoples", held on 14-15 January 1994 at the University of Antwerp. Denmark is also a strong advocate of self-determination for indigenous peoples. At WGIP 12, the United States delegate endorsed the application of self-determination "within the United States" to native Americans.

9 See, for example, Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", The Yale Journal of International Law, Vol 16 (1991), at pages 177 ff; Ralph G Steinhardt, book reviews, The American Journal of International Law, Vol 88 (1994) at pages 831-837; Robert McCorquodale, "Self-Determination: A Human Rights Approach", International and Comparative Law Quarterly, Vol 43, pages 857 ff. Colin Warbrick, book reviews, International and Comparative Law Quarterly, Vol 43, pages 965-66. Frederic L Kirgis, Jr, Editorial Comment: The Degrees of Self-Determination in the United Nations Era, The American Journal of International Law, Vol 88 (1994) at pages 304-310.

peoples[10], the Chairperson of the Working Group on Indigenous Populations, Professor Daes, has expressed the view that:

> "The concept of "self-determination" has accordingly taken on a new meaning in the post-colonial era. Ordinarily, it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences" (para. 23).

11. This concept of self-determination sits well with the present emphasis on peace-building and preventive diplomacy. Australia's statement to the 51st Session of the Commission on Human Rights contained a strong affirmation of the message that violent intra-state conflict, which is a major problem for international and human security, needs to be addressed by the international community. A comprehensive and constructive interpretation of the concept of "self-determination" for peoples within existing states is needed. Sovereign independence for every self-defined "group" is not feasible. Rather, the demands by peoples for internal self-determination, generally expressed as the maintenance of their cultural identity, including their language and spiritual beliefs, should be capable of accommodation by national governments[11]. Finally, it needs to be said that there is no single "model" of self-determination which is suitable for all states. The application of the principle will, depending upon the internal situation of each state, result in different outcomes and structures. The important element is that the principle should contribute to and inform the domestic political debate.

Self-determination for indigenous peoples

12. The content of the right of self-determination for indigenous peoples is consistent with the approach outlined in paragraph 14. It is not simply a right to participate in national affairs on an equal basis with other citizens of the state. To indigenous peoples, such an approach smacks of assimilation. Indigenous peoples' advocacy of self-determination has principally been in terms of preservation of culture, distinct identity and language, together with a power to take decisions over their own affairs. In Australia, governments have in recent times clearly applied self-determination to our indigenous peoples in a far wider sense than simple participation in national affairs.

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10 UN Document E/CN.4/Sub.2/1993/26/Add.1 of 19 July 1993.

11 "A distressing feature of recent times has been the emergence of intrastate conflict as a major problem for international and human security. The available evidence strongly suggests that violent intra-state conflict is unlikely to decrease of its own accord in the near or mid-term future. Among the conceptual rethinking on the part of the international community that is needed in order to grapple with these serious security problems is a comprehensive and constructive interpretation of the concept of "self-determination". Sovereign independence for every self-defined "group" is not feasible. The great majority of the world's states are ethnically diverse: indeed, only 20 percent are relatively ethnically homogenous. A large number of states have at least five sizeable ethnic populations. The ideal of ethnically pure states is therefore, in Australia's view, clearly unrealistic.... Australia believes that attempts to actively pursue such exclusive political arrangements lead only to the bloodshed and ethnic cleansing we have seen recently in the former Yugoslavia, the Caucasus and parts of Africa. Rather, the demands by peoples for internal self-determination, generally expressed as the maintenance of their cultural identity, including their language and spiritual beliefs, should be capable of accommodation by national governments." Australian Statement to the 51st session of the Commission on Human Rgihts, Geneva, January 1995. This passage was in turn partly derived from a paper delivered by the Minister for Foreign Affairs, Senator Gareth Evans, to the Konrad Adeneur

Where to from here?

13. It is clear that a number of governments are uneasy with any view that self-determination is a principle of any application to their people (the issue is a problem for governments of states with indigenous peoples and minorities). This stems from their concern that a right of self-determination may equate to a right of secession. In an attempt to deal with the concerns of those governments, the 1993 draft of the Declaration included the following formulation for Article 3:

> "Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government."

However, that formulation was replaced with the present formulation as a result of strong statements by indigenous peoples' organisations.

14. It is equally clear that "self-determination" for indigenous peoples is widely accepted within the Australian community. The extent of that right rightly remains a matter of political debate, particularly where autonomy or self-government for our indigenous peoples may be seen to conflict with the rights of others within the Australian community or with overall governmental responsibility to achieve particular outcomes. Our advocacy of a broad view of self-determination advances wider foreign policy interests in the promotion of democratisation and the reduction of intrastate conflicts which can threaten international peace and security.

15. Australia therefore sees value in viewing self-determination as an evolving right which is the wellspring of concepts of democracy and other human rights within the international community.

The Australian domestic context

16. Self-determination for Australia's indigenous peoples has been Government policy since 1972[12]. The present emphasis on the term dates from 1987, when then Minister for Aboriginal Affairs, Mr Hand, stated that he saw self-determination as a "vital issue", which must ensure "that Aboriginal and Islander people are properly involved in all levels of the decision-making process in order that the right decisions are taken about their lives"[13]. The principle has since been endorsed by Governments, both State and Federal, and of varying political persuasions, in their response to the Royal Commission into Aboriginal Deaths in Custody[14]. The Minister for Aboriginal and Torres Strait Islander Affairs, Mr Robert Tickner, has repeatedly endorsed the principle of self-determination for Australia's indigenous peoples

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Stiftung in Bonn on 6 July 1994 and an article by Senator Evans entitled "Cooperative Security and Intrastate Conflict", in Foreign Policy, Number 96 (Fall 1994), pages 3-20.

12 Royal Commission into Aboriginal Deaths in Custody. *National Report*, AGPS. Canberra. 1991. page 526.

13 Ibid.

14 *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission*. AGPS. Canberra. 1992, pages 718-721.

in his statements to the UN's Working Group on Indigenous Populations. Mr Tickner has stated that he sees the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Torres Strait Regional Authority as significant steps towards self-determination[15], a view shared by the Prime Minister. This articulation of self-determination is therefore a reflection of the endorsement of its broad application in the domestic context.

17. In 1990 the House of Representatives Standing Committee on Aboriginal Affairs defined self-determination as:

> "... Aboriginal control over the decision-making process as well as control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development. It means Aboriginal people having the resources and capacity to control the future of their own communities *within the legal structure common to all Australians*"[16] (italics added).

The Committee distinguished the concept from that of self-management, which it felt was a narrower term, meaning the implementation of decisions which may have been made by others.

18. While not wishing to pre-empt the right of indigenous people in Australia to speak for themselves on this subject, it is important to note that Australia's indigenous leaders are strong supporters of the right of self-determination for their peoples. They have also made it clear that they do not see acceptance of the right as having implications for Australia's territorial integrity, although that view is often expressed in political rather than legal terms. The Chairperson of the Aboriginal and Torres Strait Islander Commission, Miss Lois O'Donoghue, has stated:

> "The recognition of the right of self-determination for indigenous peoples does not lend additional weight to claims for recognition of independent sovereignty. Certainly for all peoples living within established and recognised nation-states such as Australia, the right is constrained by other considerations, including provisions of the United Nations Friendly Relations Declaration. For Aboriginal and Torres Strait Islander peoples, most would acknowledge that independent sovereignty, in any internationally recognisable sense, really is not a practical option."[17]

That statement reflects both a legal and a political viewpoint[18].

19. Indeed, some indigenous leaders in Australia expressly argue that their peoples' right of self-determination is the same as that of colonised peoples - that is, it includes a right of

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15 Statement to WGIP 12. 1994. pages 12-13.

16 Australia. House of Representatives Standing Committee on Aboriginal Affairs. *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*. AGPS. Canberra. 1990. page 12.

17 Council for Aboriginal Reconciliation. *Controlling Destinies: Greater Opportunities for Indigenous Australians to Control Their Destinies*. AGPS. Canberra. 1994. page 24.

18 Other statements are political rather than legal. Getano Lui Jnr. a member of the ATSIC board from the Torres Strait. has stated:
"Let me make one thing clear. Torres Strait Islanders are not trying to abandon Australia. We are looking at a range of options [for self-determination]. None of those options call into question our continued association with Australia in culture. spirit or law. We need reforms and improvements. not a separation. and certainly not a divorce." (Council for Aboriginal Reconciliation. *op cit*. pages 30-31).

secession, even if in practical terms that is not presently a viable option. The Australian Government does not agree with this position - indigenous peoples, like all other peoples in independent states with representative governments, do not have a right of secession, although they do have a right of self-determination.